

1 moment that that's true, well, that's going to sort itself  
2 out under the laws of the United States, whether it's  
3 through the Kiowa case he talks about or whether it's  
4 through the Oklahoma Tax Commission case that's on the  
5 books or whether it's through whatever case comes down.

6 But what I can't see is how it's contrary to the  
7 public interest to say that the allocation of jurisdiction  
8 between the Cheyenne River Sioux Tribe and its authority  
9 to regulate its own businesses and go about its own -- and  
10 go about activities and the PUC in instances in which the  
11 tribe is involved, how that allocation of jurisdiction,  
12 according to the laws of the United States and the United  
13 States Constitution, can ever be contrary to the public  
14 interest. To the extent that their jurisdiction is  
15 curtailed as a result of these sales, that's because of  
16 what the United States Constitution says and what the U.S.  
17 Supreme Court says about a state's ability to regulate  
18 tribal activities on or off the reservation. That cannot  
19 be contrary to the public interest.

20 And in particular, that becomes critical when we talk  
21 about issues such as whether or not the Tribe can engage  
22 in business activities without buying these. Every -- in  
23 today's world, economic development is critical to tribes  
24 because of the financial situation that they find  
25 themselves in. Here, they're being -- they're making a

1 business judgment as to what to do, to purchase, which is  
2 a very common way of competition. If you want to compete  
3 with someone, you can go out and buy them out and then you  
4 have more territory and they have less territory. That's  
5 the business judgment that the Telephone Authority made  
6 here. And there's no escape involved by the fact that  
7 they might compete in another way. We have to take  
8 account of the business judgment that this is the best for  
9 the Tribe to proceed. Thank you.

10 MR. MAXFIELD: Your Honor.

11 THE COURT: Yes.

12 MR. MAXFIELD: May I just make one comment?

13 THE COURT: All right. Very briefly.

14 MR. MAXFIELD: Yes, sir.

15 Mr. Long had mentioned that -- reiterated the point  
16 that some subscribers, maybe most subscribers in these  
17 exchanges have no ability to self-regulate. They can't  
18 vote in tribal elections. I would submit that in any  
19 state and certainly in the State of South Dakota that's  
20 already a fact of life on-reservation or off. There are  
21 businesses that subscribe to telephone service which are  
22 owned by non-citizens of the State of South Dakota.  
23 Consequently, they can't vote in South Dakota elections.

24 In addition, it seems to me that that's the no  
25 ability to self-regulate really is yet another -- has a

1 problem under the Wold Engineering case because what the  
2 Commission is saying is that if they could vote, then  
3 approval would be granted, assuming the ability to  
4 control, et cetera.

5 So -- and there's nothing more fundamental than -- in  
6 federal eyes than the right of self-government, the  
7 tribe's right of self-government as indicated in the Wold  
8 case itself. And the self-government means determining  
9 its political mechanisms and deciding who is involved. So  
10 I would assert, your Honor, that that really does raise  
11 implications under the Wold case.

12 THE COURT: Okay. Well, I agree with Mr. Welk that  
13 this matter has gone on for too long and I acknowledge  
14 part of the delay is my fault on the last opinion. I'm  
15 going to give you a decision and hopefully address the  
16 issues that you've raised, although trying to do this  
17 orally is not going to be obviously as organized as it  
18 could be if I wrote an opinion.

19 Let me start with the issue of whether or not the  
20 Commission's decision violated 1-26-36. That issue really  
21 comes down to one of whether the Commission's Findings of  
22 Fact and specifically, in this case we're talking about  
23 Finding of Fact 11 -- really 11 through 25, whether those  
24 Findings of Fact as a matter of law justify its decision.

25 The Court does not see any real material issues of

1       disputed fact contained in the underlying Findings. Now,  
2       that is not to say that there's no interest about --  
3       there's no dispute about Finding of Fact Number 25,  
4       whether or not it's in the public interest because  
5       obviously there is, but the underlying Findings about  
6       enforcement mechanisms and lack of regulatory control, and  
7       taxes and rates for the next 18 months, I mean those types  
8       of things are really not in dispute.

9               So the question under 1-26-36 really is whether or  
10       not these findings that have been made, the underlying  
11       findings, support the decision to not approve the sales.  
12       Now, the Court has previously addressed some of the  
13       federal Indian law issues and to the extent necessary that  
14       decision is reincorporated. But on the issue of the  
15       1-26-36 review, the Court first would point out or note  
16       that essentially, it appears from reading Findings 11  
17       through 25 that the Commission ultimately denied approval  
18       in this case because of its perceived lack of ability to  
19       impose conditions, many of which as it did in other sales.  
20       Secondly, because of a loss of regulatory authority after  
21       the sales would be completed. And third, because of a  
22       loss of tax revenue. And I think fourth, a simple public  
23       interest evaluation.

24               This Court finds it highly significant that with  
25       respect to these four areas of concern, the Tribe in its

1       briefs and its arguments is not arguing that these factors  
2       are matters which today have been adequately addressed.  
3       On the contrary, just one example in the tax area, on page  
4       10 of the Appellant's brief -- and I'm quoting -- they  
5       indicate that "concern over the payment of taxes can be  
6       adequately addressed by the State in the event that the  
7       Commission approved the sale." Well, the same argument is  
8       essentially being raised with respect to all four areas of  
9       the Commission's concern. And this Court does not believe  
10      that a willingness to enter into an agreement is equal to  
11      an agreement or is equal to adequately addressing these  
12      areas of concern.

13             I agree with the comment, I believe it was Mr. Long  
14      or someone, or perhaps Mr. Hoseck that the Commission had  
15      to rule as the situation existed today, not as the  
16      Authority argues, as can it be addressed in the future.  
17      So I think that's extremely significant in evaluating  
18      whether the Commission's Findings as a matter of law  
19      justify its ultimate Findings and Conclusions. This Court  
20      is of the belief that when viewed in that context the  
21      Commission's Decision is justified by its Findings and is  
22      not erroneous as a matter of law or arbitrary or  
23      capricious.

24             The Findings of Fact 11 through 25 in the Commission  
25      Decision set forth numerous grounds upon which the

1 statutory criteria -- I should say upon which a regulatory  
2 agency like the Public Utilities Commission could deny a  
3 sale to any entity under the statutory criteria. The  
4 statute does not require that any one of those factors be  
5 considered over the others. It leaves it to the  
6 discretion of the Commission and after having reviewed  
7 this record on two occasions, and after now reviewing it,  
8 I cannot say that these Findings are in violation of 1-26  
9 insofar as the argument that they don't support the  
10 decision.

11 Now, the second issue is on the motion to reopen and  
12 whether the Commission erred in not reopening in light of  
13 the matter of a new commissioner, the matter of the  
14 Federal Act -- the Federal Telecommunications Act,  
15 specifically, Section 253(a), which provides that no state  
16 statute may have the effect of prohibiting the ability of  
17 an entity to provide intrastate service, and the tribal  
18 resolution of the Standing Rock Tribe and the alternative  
19 dispute resolution mechanism which was proposed.

20 The Court notes on this issue first of all, that I  
21 agree the issue of the Nelson -- Commissioner Nelson's  
22 appearance on the board is essentially moot. The first  
23 vote was three to nothing and Commissioner Nelson's  
24 presence or absence would not have changed that.

25 On the issue of the federal statute, as I indicated

1 in the oral argument, I frankly had some concerns about  
2 that because the Commission I think -- I thought at first  
3 would have an obligation to consider whether or not this  
4 statute is in effect prohibiting the Authority to provide  
5 intrastate service. However, I note that Section 253(d)  
6 of that Act leaves that question to the exclusive  
7 jurisdiction of the Federal Communications Commission to  
8 determine whether or not it should -- it appears to me the  
9 federal statute gives the FCC alone the jurisdiction to  
10 preempt a state statute such as the one that's involved  
11 here. Now that matter hasn't been specifically briefed,  
12 but it appears to me that's the case. So that doesn't  
13 appear to require a remand.

14 The other two matters it appears to me were fair game  
15 in the first hearing. These are matters which I think  
16 could have been anticipated at the time of the first  
17 hearing. And if not -- even if not, I don't believe  
18 parties to litigation, especially administrative  
19 litigation like this, are free to litigate, appeal, find  
20 out what matters are deficient and then shore up the  
21 decision by -- by enacting new resolutions or proposing  
22 new alternative dispute resolution mechanisms after they  
23 find out what the decision is.

24 In this case, the Court believes that 1-26-34 is the  
25 required mechanism for consideration of new evidence under

1 the Administrative Procedures Act. There has been no  
2 request under 1-26-34 for those matters to be considered  
3 and consequently, I find no err in the denial of the  
4 request to reopen at the administrative level.

5 The next issue which I'll try to address is the what  
6 I'll call the jurisdictional issue involving the weighting  
7 principles of Indian law and how those principles  
8 inter-react with the regulatory and taxing authority of  
9 this State. More specifically, I guess, whether -- the  
10 question, I guess, is whether the Commission's reliance on  
11 loss of tax revenue and regulatory authority violate this  
12 Court's prior decision and recognize principles of Indian  
13 law. I conclude that they do not. Under Wold, the  
14 Supreme Court has clearly articulated that the State may  
15 not deny access to the courts for -- or on condition that  
16 a tribe generally -- or waive its sovereign immunity.

17 In the final analysis, I think it simply could be  
18 stated that at least in my opinion, the general denial of  
19 access to courts in Wold is not tantamount to the  
20 unfettered ability of a tribal entity to purchase a highly  
21 regulated, non-Indian, commercial business enterprise that  
22 is serving primarily non-tribal and non-Indian subscribers  
23 especially where the tribe is free to access and compete  
24 in this same market by other means and to use other means  
25 to engage in the same commercial activity. So for those



1 reasons, I conclude that the Wold prohibition is not  
2 applicable.

3 Finally, the issue of equal protection. As the Court  
4 views the arguments, the equal protection argument is  
5 really premised on the notion that their decision is  
6 requiring the Tribe to waive some or all aspects of its  
7 sovereign immunity. While the prior decision of the  
8 Commission quite clearly reflected that it did do that,  
9 the matter was remanded to specifically reconsider this  
10 case without doing that. Here, the new decision does not  
11 appear to the Court to be designed to deny similar  
12 purchases to all Indian tribes because it simply is not  
13 conditioned on a waiver of the Tribe's sovereign immunity.

14 As this Court noted in its initial opinion, while the  
15 Commission may not condition approval on a waiver of  
16 sovereign immunity, it may consider the effects, if  
17 material, under the statutes. And here, as we discussed  
18 in the oral argument, all the parties bring to the table  
19 certain attributes and certain disabilities and in this  
20 highly commercial area, it appears to the Court that there  
21 simply is no basis for the underlying notion that this  
22 statute is being applied in such a way as to require a  
23 waiver of tribal sovereign immunity.

24 I think that conclusion is buttressed in a great  
25 extent by the fact that the decision on its face does not

1 deny all tribal entities the ability to purchase, but  
2 moreover, and more importantly, the Telephone Authority in  
3 this case has repeatedly argued that they are willing to  
4 negotiate the necessary agreements to satisfy the Public  
5 Utilities Commission's concerns. The fact of the matter  
6 is they simply have failed to do so.

7 And finally, I guess, I think it's significant on  
8 this issue, especially as applied to the issue to the  
9 Cheyenne River Sioux Tribal Telephone Authority, that here  
10 both US West and the Authority specifically in their  
11 agreement agreed that they would subject themselves to the  
12 Public Utilities Commission approval. So I don't  
13 believe -- at least in my opinion, I don't conclude that  
14 there is an as applied equal protection violation present  
15 here.

16 For all those reasons, I'm going to affirm the  
17 decision of the Commission. Counsel for the Commission  
18 should submit an order.

19 MR. WELK: Your Honor, the Conclusions and Findings  
20 are affirmed in total?

21 THE COURT: Yes, I'm affirming the Findings of Fact  
22 and Conclusions of Law and Decision of the Commission.

23 We'll be in recess.

24 (Conclusion of Oral Argument.)  
25

1 STATE OF SOUTH DAKOTA)

) SS

CERTIFICATE

2 COUNTY OF HUGHES )

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I, Connie Heckenlaible, Official Court Reporter and Registered Professional Reporter in and for the State of South Dakota, do hereby certify that the Transcript of Oral Argument contained on the foregoing pages 1 through 61, inclusive, were reduced to stenographic writing and thereafter transcribed; that said proceedings commenced on February 11, 1998, in the Courtroom of the Hughes County Courthouse, Pierre, South Dakota, and that the foregoing is a full, true and complete transcript of my shorthand notes of the proceedings had at the time and place above set forth.

Dated this 23rd day of February, 1998.



Connie Heckenlaible, RPR  
Official Court Reporter

AT A REGULAR SESSION of the Public Utilities Commission of the State of South Dakota, held in its offices, in the City of Pierre, the Capital, this 10th day of November, 1958.

PRESENT: Commissioners Doherty and Merkle.

IN THE MATTER OF THE APPLICATION OF THE  
CHEYENNE RIVER SIOUX TRIBE OF INDIANS OF  
SOUTH DAKOTA FOR A CERTIFICATE OF PUBLIC  
CONVENIENCE AND NECESSITY TO OPERATE A  
TELEPHONE SYSTEM.

ORDER  
(F-2554)

The Cheyenne River Sioux Tribe of Indians of Cheyenne Agency, South Dakota, having acquired the property and operating rights of the West River Telephone & Electric Company of Eagle Butte, South Dakota, which acquisition this Commission believes to be in the public interest, and the said Cheyenne River Sioux Tribe of Indians having then applied for a certificate of public convenience and necessity to maintain and operate a telephone system in the territory heretofore occupied by the said West River Telephone & Electric Company and the reservation area in Ziebach County and parts of Dewey County, South Dakota, as more particularly set out in its application; and the Commission having found that the proposed system does not appear to invade the territory (as hereinafter determined) of any other telephone company now furnishing adequate telephone service, and that public convenience and necessity requires construction, maintenance and operation of the proposed system; it is

ORDERED, that the acquisition of the property and operating rights of the West River Telephone & Electric Company by the Cheyenne River Sioux Tribe of Indians, be, and the same, is, hereby approved.

ORDERED FURTHER, that a certificate of public convenience and necessity be issued to the Cheyenne River Sioux Tribe of Indians of South Dakota, authorizing it to construct, maintain and operate a telephone system in all of Ziebach and a part of Dewey Counties, South Dakota, subject to such change and revision as facts and circumstances may hereinafter require.

ORDERED FRUTHER, that any independent (Switcher) telephone company, now operating in any of this territory, has a prior right to the area in which it now operates and may continue to so operate independently, provided it maintains its lines and equipment of a type and in a condition suitable for connecting to the company's main facilities.

BY ORDER OF THE COMMISSION:

  
E. F. NORMAN, Secretary

(OFFICIAL SEAL)

AT A REGULAR SESSION of the Public Utilities Commission of the State of South Dakota, held in its offices in the City of Pierre, the Capital, this 17th day of October, 1975.

PRESENT: Commissioners Weiland, Ecker and Klinkel.

IN THE MATTER OF THE APPLICATION OF )  
CHEYENNE RIVER SIOUX TRIBE TELEPHONE )  
AUTHORITY FOR A CERTIFICATE OF PUBLIC )  
CONVENIENCE AND NECESSITY TO OPERATE )  
A TELEPHONE SYSTEM IN PARTS OF )  
ZIEBACH AND DEWEY COUNTIES, SOUTH )  
DAKOTA. )

REVISED ORDER  
(F-2554)

Under date of November 10, 1958, the Commission entered its Order in this Docket F-2554 authorizing the Cheyenne River Sioux Tribe Telephone Company to operate a telephone system in parts of Ziebach and Dewey Counties as more particularly defined in the certificate issued in pursuance of said Order.

On July 28, 1975, the Cheyenne River Sioux Tribe Telephone Authority filed an application for a revision and expansion of the service area boundary line previously authorized. Such expansion lies adjacent to the applicant's northern boundary in Corson County and the purpose of said expansion is to include in the certified area of the Cheyenne River Sioux Tribe Telephone Authority an order that said company may serve this area. The revision also includes excluding part of the territory in Ziebach County that is adjacent to the Faith Telephone Company and revises its boundary back to near the community of Red Elm.

Pursuant to SDCL 49-31-22, the Commission, on September 19, 1975 notified the Northwestern Bell Telephone Company and the Golden West Telephone Cooperative, Inc. and the West River Cooperative Telephone Company of the application which was received from Cheyenne River Sioux Tribe Telephone Authority on July 28, 1975. On September 23, 1975, the Commission received a letter from the West River Cooperative Telephone Company that the map of notification was in error and that the boundary line should have been a mile east as it appeared on West River Cooperative Telephone Company's letter to us. On September 29, 1975, the Commission received a letter from Northwestern Bell Telephone Company noting that a further correction had to be made since Northwestern Bell served a Mr. Hand in the territory that Cheyenne River Sioux Tribe Telephone Authority wished to include in its Certificate of Public Convenience and Necessity.

The Commission finds that no other telephone company's lines will be affected, paralleled or duplicated by the applicant's proposal; that the expansion of the service area will not invade the service territory of any other company; and that the proposal is in the public interest; it is therefore

ORDERED, that a Certificate of Public Convenience and Necessity be, and the same is, hereby issued to Cheyenne River Sioux Tribe Telephone Authority authorizing it to construct, maintain and operate a telephone system in its territory more particularly defined by the attached map labeled Exhibit A-1 subject to such change and revision as the Commission deems necessary as the facts and circumstances may hereafter require.

BY ORDER OF THE COMMISSION:

*Joe Norton*  
JOE NORTON, EXECUTIVE SECRETARY

(OFFICIAL SEAL)

DOCUMENT OFF-LINE

This page has been substituted for one of the following:

- o An oversize page or document (such as a map) which was too large to be scanned into the RIPS system.

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1. SENIOR  
CITIZENS  
HANDBOOK